International Judicial Observer

NEWS AND COMMENTARY OF INTEREST TO JUDGES AROUND THE WORLD

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Major International Judicial Conference to Meet in Washington

The fourth International Judicial Conference for justices of supreme courts and constitutional courts in Europe will convene at the Federal Judicial Center in Washington, D.C., October 1–2, 1996.

The conference is being organized by the Center for Democracy, a Washington-based nonprofit corporation, with assistance from the Federal Judicial Center and is being funded primarily by a grant from the U.S. Agency for International Development.

The focus of the conference will be "The Role of an Independent Judiciary: Implementation of Criminal Justice and Commercial Law Reforms." It will consist of five plenary sessions dealing with the following topics:

• the role of the judiciary in democratic market societies during stages of transition, with comparative European models;

• issues of interpretation of commercial and criminal laws;

• court organization;

• international issues and obligations; and

• judicial leadership.

Chief Justice Vyacheslav Lebedev of the Supreme Court of the Russian Federation will lead a panel discussion for the first session. Other panelists for the session will be Justice Lech Gralicki of the Constitutional Court of Poland and Justice Alexander Arabadjiev of the Constitutional Court of Bulgaria.

Speakers for other panels include Justice Veniamen Yakovlev of the Russian Supreme Arbitrage Court, Justice Milan Karabin of the Supreme Court of the Slovak Republic, Justice Steffan Magnusson of the Supreme Court of Sweden, Justice Claude Rouiller of the Federal Tribunal of Switzerland, Stefan Trechsel, president of the European Commission of Human Rights, and Justice Vladimir Paul of the Constitutional Court of the Czech Republic.

Chief Justice Rait Maruste of the National Court of Estonia will make a presentation at the final session on judicial leadership.

At least three justices of the U.S. Supreme Court are expected to take part in the conference: Justices Sandra Day O'Connor, Ruth Bader Ginsburg, and Antonin Scalia.

The conference will be the fourth organized by the Center for Democracy. The first two conferences were held in Strasbourg, France, in 1993 and 1994. Last year's conference was held at the Georgetown University Law Center in Washington, D.C. ❑

Center for Democracy President Allen Weinstein and Vice President of the Constitutional Court of the Czech Republic Ivana Janu at last year's International Judicial Conference.

Former U.S. Judge Presides at First International War Crimes Trial Since Nuremberg; McDonald Heads Three-Judge Panel in The Hague

by James G. Apple

Gabrielle Kirk McDonald, the third African-American woman to be appointed to the federal judiciary, is now presiding over the first international war crimes trial since the Nuremberg trials in 1945–1946.

Judge McDonald leads a three-judge panel hearing the trial of Dusan Tadic, a Bosnian Serb bar owner accused of atrocities committed in 1992 in and around Serbian prison camps in northwestern Bosnia during the civil war in Bosnia-Herzegovina. The trial began in The Hague in May of this year.

Selected as one of the 11 members of the International Criminal Tribunal for the Former Yugoslavia in the early fall of 1993 by a committee of the United Nations, Judge McDonald received the highest number of votes among 22 candidates for the Tribunal. She took the oath of office for her new position in November 1993.

Her panel is hearing 132 separate charges against Tadic for crimes against humanity and war crimes under the Geneva Convention that involve gang rape, beatings, torture, and murder of Muslim and Croat prisoners at three prison camps. He has been in custody since the spring of last year.

Tadic's trial is expected to last four months and may involve the testimony of 150 witnesses.

The other 10 members of the tribunal are:

Gabrielle McDonald, former judge of the U.S. District Court for the Southern District of Texas, presides over war crimes trial in The Hague, Netherlands.

• Antonio Cassese of Italy (President of the International Criminal Tribunal and head of its Chamber of Appeal);

• Adolphus Karibi-Whyte of Nigeria;

• Haopei Li of the People's Republic of China;

• Jules Deschenes of Canada;

• Sir Ninian Stephen of Australia;

• Claude Jorda of France;

• Elizabeth Odio-Benito of Costa Rica;

• Fouad Riad of Egypt;

• Lal Chand Vohrah of Malaysia; and

• Rustam S. Sidhwa of Pakistan.

Judges Vohrah and Stephen are sitting with Judge McDonald on the Tadic case.

The chief prosecutor for the Tribunal is Richard J. Goldstone of South Africa. The specific prosecutor for the Tadic trial is Grant Niemann of Australia.

Judge McDonald was appointed a U.S. district judge in Houston in 1979 by President Jimmy Carter. Prior to her appointment she had been a lawyer for the NAACP Legal Defense and Education Fund in New York, and a practicing lawyer with her husband in Houston, specializing in plaintiff employment discrimination cases.

She resigned her federal appointment in 1988 to return to private practice in Austin and San Antonio.

After accepting an offer to teach at the Thurgood Marshall School of Law at Texas Southern University in 1993, Judge McDonald received a call from Conrad Harper, Legal Adviser in the U.S. State Department, asking her if she was interested in the war crimes tribunal position. After first rejecting the idea, she then accepted the nomination.

Following her selection she worked with members of the faculty of the law school at Texas Southern University to develop a procedural code for the Tribunal, some of which was later incorporated into a final code adopted by the full tribunal.

Judge McDonald attended Boston University and Hunter College in New York, and graduated first in her class from Howard University School of Law in Washington, D.C., in 1966. ❑

Where to Find It: The Substance of International Law

by James G. Apple

Domestic judges faced with deciding a case that involves the application of or reference to international law may question where one goes to find the substance of it.

Article 38 of the Statute of the International Court of Justice prescribes the sources of international law to be used in the resolution of disputes: international conventions, international custom, the general principles of law recognized by civilized nations, judicial decisions, and the teachings of the most highly qualified publicists of the various nations.

There exist a number of resources to assist the researcher in locating the substance of international law, not only for American judges but for judges around the world. While it would not be possible to review all publications that provide materials relating to, and commentaries about, international law, the following is a description of some of the major resources for finding international law in the various forms in which it exists:

International Legal Materials (ILM)—ILM is a bimonthly publication of the American Society of International Law, located in Washington, D.C. ILM is published in January, March, May, July, September, and November.

There are currently 35 volumes of ILM containing the texts of important treaties and agreements; decisions in judicial and similar proceedings, such as arbitral awards; texts of important legislation and regulations; texts of a variety of documents, such as U.N. General Assembly resolutions; summaries of international law meetings and conferences; and reports of trade negotiations.

One special section of ILM relates to recent actions regarding treaties to which the United States is a party and treaties to which the United States is not a party.

Further information about the ILM can be obtained from the American Society of International Law, 2223 Massachusetts Avenue, N.W., Washington, DC 20008-2864, phone (202) 939-6000.

International Law Reports—The Research Center for International Law at the University of Cambridge in England regularly publishes, through Grotius Publications of the University of Cambridge Press, another compendium of treaties, judicial decisions, and other materials.

International Law Reports was first published in 1932 by the Department of International Studies at the London School of Economics. There are now 101 volumes of the series, which contain decisions of international courts and tribunals, decisions of national courts relating to international law (including U.S. court decisions), treaty provisions, decisions of arbitral tribunals, and other materials.

An index to volumes 81–100 covering the period 1990–1995 was published in January of this year. According to a preface in the publication, "*International Law Reports* endeavor to provide within a single series of volumes comprehensive access in English to judicial materials bearing on international law." Further information about the *Reports* can be obtained from the Research Center for International Law, 5 Cramner Road, Cambridge, England CB39BL, phone 01223-335358.

International Court of Justice Reports—Judgments, advisory opinions, and orders of the International Court of Justice (ICJ) in The Hague, Netherlands, are printed in the reports of that court. Information about this and other publications relating to the court can be obtained from the Sales Section, United Nations, New York, NY 10017, or from Distribution and Sales Section, Office of the United Nations, 1211 Geneva 10, Switzerland.

Reports of Cases Before the European Court of Justice and the European Court of First Instance—Judicial decisions of the European Court of Justice and the European Court of First Instance in Luxembourg are collected and published in reports of cases for those two courts. The reports are published in nine languages: Spanish, Danish, German, Greek, English, French, Italian, Dutch, and Portuguese.

The reports usually include a summary of the judgment, the opinion of the Advocate General and the judgment of the court.

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Inside . . .

Notice to our readers

Downloadable files of all editions of the *International Judicial Observer* can be found at the Federal Judicial Center's web site (http://www.fjc.gov) on the World Wide Web. *Observer* issues can be found by clicking the Publications icon and looking under the heading "State–Federal Judicial Affairs."

Legal and Judicial Reform in Bulgaria

by Justice Mario Babitinov
Supreme Court of Bulgaria

(This article was prepared in part by Justice Babitinov while a Visiting Foreign Judicial Fellow in residence at the Federal Judicial Center in 1995.)

The Republic of Bulgaria has radically transformed itself since 1989. It now has a parliamentary system of government. The people exercise sovereign power through a democratic constitution and through a democratically elected parliament and president, part of their multiparty political system.

Bulgarian public life is increasingly characterized by political pluralism, although threats to such tolerant pluralism do exist. Independent trade unions and independent news organizations have emerged as powerful social forces. To an extent not possible under old, cold war conditions, Bulgaria's foreign policy now respects international law.

The constitution of Bulgaria is the supreme law and its provisions apply directly. Rights and duties created in it are enforceable without further legislation.

The new constitution was adopted on July 12, 1991, by the Grand National Assembly. It was the first freely elected post-Communist parliament. The "grand" in its name signified its powers to promulgate constitutional provisions as well as normal statutes. The present, elected parliament is an ordinary National Assembly.

The constitution guards the national integrity of Bulgaria and guarantees equal rights before the law to all Bulgarian citizens by pledging adherence to universal human values and by proclaiming the dignity and personal security of the individual. The importance of these guarantees is obvious given the absence of such rights under the previous regime and the particular persecution of persons belonging to the Turkish minority.

All international treaties, ratified by constitutionally established procedures, are considered part of domestic legislation and supersede any contrary domestic legislation. This provision makes Bulgaria one of the most progressive countries in promoting respect for international law.

The judicial branch is independent and safeguards the rights and legitimate interests of all citizens, legal entities, and the state. This contrasts with the court system under the old regime in which the Communist Party effectively controlled the judiciary. An independent judiciary is a prime element in a movement toward a civil society governed by the rule of law.

Under the 1991 Constitution, the legal system is administered by supreme courts and appellate, district, and regional courts. A judicial system act, passed in 1994, implemented the judicial structure prescribed by the Bulgarian Constitution. The judicial act also provides the procedures to be followed in the courts and other mechanisms necessary for the functioning of the court system.

The judicial system under the new act is a three-tiered system of first instance, appellate and cassation courts. There are seven different types of courts: regional, district, military, appeals, the Supreme Court of Cassation, the Supreme Administrative Court, and the Supreme Constitutional Court.

Regional courts are general jurisdiction courts of first instance, presided over by one judge and two lay assessors. The lay assessors, provided for in the new constitution, are appointed for five-year terms by the local courts.

District courts decide appeals from the judgments of district courts as well as hear certain cases in the first instance. Three-judge panels hear cases in these courts, which are divided into three "colleges": civil, criminal, and administrative.

A court of appeal, sitting in three-judge panels, hears appeals from district court cases of first instance.

The Supreme Court of Cassation, located in the Bulgarian capital of Sofia, is the highest court for civil and criminal appeals. It decides issues of interpretation of statutes and assures the uniform enforcement of laws by all courts in civil and criminal cases, and is divided into civil, criminal, and military colleges. The Supreme Administrative Court has similar

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A note to our readers

The *International Judicial Observer* welcomes comments on articles appearing in it and ideas for topics for future issues. The *Observer* will consider for publication short articles and manuscripts on subjects of interest to judges from the United States, other countries, or international tribunals. Letters, comments, and articles should be submitted to Interjudicial Affairs Office, Federal Judicial Center, Thurgood Marshall Federal Judiciary Building, One Columbus Circle, N.E., Washington, DC 20002-8003.

SECUNDUM LEGEM

Progress Toward the Creation of an International Criminal Court

by Dr. William C. Gilmore
Professor of International Criminal Law
University of Edinburgh, Scotland

The ideal that the international community should possess a judicial body to exercise criminal jurisdiction over individuals as opposed to states was revived as a subject of serious international and governmental interest in the latter part of the 1980s. The revival was the result of a number of factors, including the lessening of cold war political tensions and concern about the growth of various forms of transnational criminality.

The Prime Minister of Trinidad and Tobago proposed that the United Nations consider establishing an international adjudicative body with jurisdiction over illicit drug trafficking and other transnational criminal activities. This proposal struck a responsive chord in the international community. In particular, it helped to focus attention on the special problems faced by small or otherwise vulnerable members of the international community, which are often not equipped to oversee complex and expensive major international criminal trials.

International Law Commission

Within the U.N. system the topic was remitted to the International Law Commission (ILC), a body of distinguished jurists created by the United Nations. In 1993 the ILC received from a working group established to deal with this issue a highly detailed report containing a draft statute. The report was referred to the U.N. General Assembly for comment. At the same time serious concern had surfaced within the international community over reports of widespread and serious violations of international humanitarian law being perpetrated in the former Yugoslavia, especially in Bosnia. On May 25, 1993, the U.N. Security Council formally expressed its determination to put an end to such acts and to bring to justice those responsible for them. Specifically invoking its powers of decision under Chapter VII of the U.N. Charter, the council, in Resolution 827 (1993), established an international tribunal for the sole purpose of prosecuting persons responsible for such grave acts in the period since January 1, 1991.

In the latter part of 1993 the draft statute prepared by the ILC working group received detailed consideration in the Sixth (Legal) Committee at the U.N. General Assembly in New York. In the course of the debates on this issue there was strong support in principle for the creation of a permanent international criminal court. However, many delegations expressed reservations about a range of issues relating to such a proposal. Much of the debate concentrated on such fundamental matters as the mode of creation of the court and its relationship to the U.N.; the nature and extent of its jurisdiction, including the right of the Security Council to initiate proceedings; and the method of surrender of alleged offenders to the court and related questions of international cooperation in criminal matters.

The working group undertook the demanding task of adapting and refining the 1993 proposals in the light of the views that had been articulated both by governments and other interested bodies. The revised text, consisting of 60 draft articles, one annex, and extensive supporting commentaries, was formally adopted by the Commission in sufficient time to be included in its 1994 Report to the General Assembly.

By the time the issue of a permanent international criminal court was reached in the 1994 debates of the Sixth Committee, planning in the Security Council to create another ad hoc international tribunal to prosecute those responsible for genocide and other serious violations of international humanitarian law in Rwanda was at an advanced stage. For many this initiative served to strengthen the case for the creation of a permanent court structure.

Many nations participated in the debates, during which strong support was expressed for a diplomatic conference to be convened in 1996 to elaborate and adopt a statute for an international criminal court. The debates resulted in an agreement to establish an ad hoc committee, open to all United Nations members, that would facilitate a further process of intensive consultation. Its task was to review the major issues arising from the ILC draft and chart the future course of the proposed statute. After discussions, the ad hoc committee submitted a report to the U.N. General Assembly. The Assembly then decided by resolution to establish an open-ended preparatory committee.

Committee Mandate

This committee's mandate is "to discuss further the major substantive and administrative issues arising out of the draft statute prepared by the International Law Commission and, taking into account the different views expressed during the meetings, to draft texts, with a view to preparing a widely acceptable consolidated text of a convention for an international criminal court as a next step towards consideration by a conference of plenipotentiaries. . . " The assembly also urged participation "by the largest number of states possible in the work of this body." It met in New York in late March and early April 1996 and reconvened in August. Thereafter it will report to the 51st session of the General Assembly, which will decide on a future course of action.

The Draft Statute for an International Criminal Court

The 1994 draft statute provides the central focus for ongoing intergovernmental discussions about the proposed court. Although an in-depth examination of that complex text lies beyond the scope of this article, some of its major features are worth examining.

It is important to emphasize that the court, as envisaged by the ILC, is a body with a highly circumscribed jurisdiction. As stated in the Preamble, it is to be used for the trial of those persons accused of "the most serious crimes of concern to the international community as a whole." Furthermore, the ILC noted that "it is intended to operate in cases where there is no prospect of those persons being duly tried in national courts." The emphasis is thus on a court that will complement existing national jurisdictions and existing procedures for international judicial cooperation in criminal matters and not exclude the existing jurisdiction of national courts, or affect the right of states to seek extradition and other forms of international judicial assistance under existing arrangements. Various substantive provisions have been inserted in the text in an effort to ensure that only those cases envisaged in the Preamble are dealt with by the court.

Throughout the intergovernmental discussions of 1995, much emphasis was placed on the importance of this principle of complementarity in defining the proper role for the proposed court. However, con-

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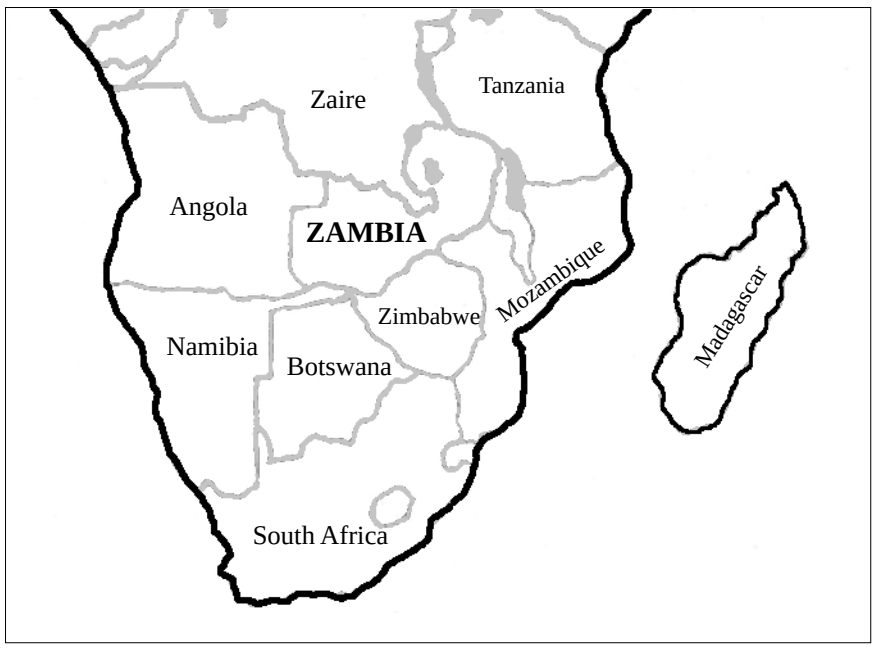
Zambian Trips Provide Judge with Adventures, Insights into Africa

by Judge J. Rich Leonard
(U.S. Bank. E.D. N.C.)

The biggest adventures of my life—two trips to the African nation of Zambia—began with a phone call during an afternoon recess in March 1994. An officer with the U.S. Information Agency wanted to know if I would go to Zambia in May of that year to act as a consultant to the Zambian judiciary. I agreed, certain that nothing would ever come of it. The next thing I knew, an application for a diplomatic passport and a list of required shots arrived in the mail.

On my first trip, I left Raleigh, N.C., on April 29, 1994, changed planes in New York, and flew for 16 hours to Johannesburg, South Africa. I arrived in Zambia during the middle of their elections, a day after the international arrival terminal at the airport had been bombed. Needless to say, security was tight. My return visit, in June 1995, was less eventful. It was also more enjoyable, because I took as a traveling companion my oldest son, Matt, a college sophomore.



Zambia is a country of eight million people, one and a half million of whom live in Lusaka, its capital. In colonial times, it was Northern Rhodesia. Copper, which was the country's primary value to the British Empire, is still its primary export. Unfortunately, as copper prices have dropped, the economy has fallen on hard times. Nonetheless, it has a long-standing democratic tradition, multiple political parties, an active parliament, and a very free press. Because of these shared values, the United States has always been interested in Zambia. Particularly now, as the Zambians are attempting to privatize many of their industries, establish a stock market, and retrench on many social welfare programs, they look to the United States as a model.

But why the interest in American judges? In 1991, the Zambians adopted a new constitution that, for the first time, requires the creation of an independent and autonomous judiciary. To make this new provision operable, the Zambian government made a formal request to the U.S. government for assistance.

During my first visit, I had two tasks. The first was to advise the Zambian judges and administrators on developing a plan for and establishing a central administrative structure. The second was to evaluate their procedures for handling cases and suggest improvements. During my second visit, the list of tasks expanded. I conducted a workshop on court administration for 20 senior court managers, worked on revisions to rules of procedure, and tried to assist with an embryonic automation program.

During each trip, I was given an office in the Supreme Court building in Lusaka adjacent to the Chief Justice and Madame Secretary (their senior administrator). I had access to staff at all levels of the judiciary. During my first visit, I spent a frantic two weeks trying to understand the Zambian system, complicated by the fact that everyone spoke beautiful but differently accented English, depending on his or her native tribe. Without exception, I found the Zambians to be courteous, patient, and intensely curious about the American justice system and American society in general.

The Zambian courts remain true to the British model. Judges, many of whom were educated in England, wear wigs and are addressed as "my lord" or "my lady." I was struck by the enormous respect and deference shown judges. As I, or any judge, would go up the steps of the courthouse, people passing would stop, lower their heads, and murmur "my lord." On my first afternoon, I took off for a customary jog. One of the porters at the hotel caught up with me and said, "I say, my lord, have you left something I can fetch for you, or do you just trot?"

True to the British model, Zambian courts still use intricate and time-consuming procedures. Criminal cases move slowly. It was not unusual for defendants to remain in jail for three or four years before trial, making multiple appearances in court throughout. Their practices in maintaining judicial calendars struck me as inefficient. Because there are no juries, judges feel no urgency to complete a proceeding. Thus, if the day ends and a trial is not complete, the judge simply adjourns it to the next free day, usually six months in the future. I uncovered one murder trial that took 17 days to complete over a two-year period. There is no probation or parole system—defendants simply serve their sentences and are released. In fact, they have a common verdict called "Guilty and Discharged" that puzzled me at first. It means that because it took so long to come to trial the defendant is simply given his time served as punishment.

As was once true of our courts, the pace of litigation is entirely lawyer-driven. Continuances are easily obtained, and for the flimsiest of reasons. Nevertheless, the judges are hardworking and genuinely interested in new ideas.

The courts face many shortages of equipment and supplies. During one of my visits to a trial in progress, the judge had to stop the proceedings because no additional paper could be found for note taking.

I took enormous pride in being in Zambia as a representative of the United States. Time and again Zambian officials told me how appreciative they were that American judges had come to assist them in their own country rather than requiring them to travel to the United States. I also fell in love with Africa, with its vastness, its gentle people, its easy pace of life. I hope to return some day.

(*Editor's note:* In August 1996, after the preparation and submission of this article, Judge Leonard returned from his third trip to Zambia, where he helped draft new rules of procedure for the Zambian courts.) ❑

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siderable difficulties have been encountered in translating the principle into a practical definition of the nature of the optimal relationship between the proposed international body, national courts, and investigative procedures. Wide divergences of views exist on the precise impact it should have on substantive provisions. Indeed, there are indications that the concept of complementarity is so general and the views of individual countries with regard to its translation into practice are so varied that its real utility is open to question.

Workable Structure

To support a limited category of serious offenses of international concern, the draft statute seeks to produce a workable structure for investigation, prosecution, and trial and, in cases where convictions are secured, for the appropriate punishment of the individuals concerned. To that end it is divided into eight parts: (1) the establishment of the court; (2) composition and administration; (3) jurisdiction; (4) investigation and prosecution; (5) the trial; (6) appeal and review; (7) international cooperation and judicial assistance; and (8) enforcement.

It is clear from the debates in the Sixth Committee and in the 1995 work of the ad hoc committee that many countries, including the United States, continue to harbor a range of reservations and concerns about specific issues. It appears, however, that the most significant differences of view revolve around the suggested jurisdictional system for the court. Of critical importance is the identification of the crimes falling within its mandate.

Article 20 of the draft statute suggests that the court be provided with subject matter jurisdiction over genocide, aggression, serious violations of the laws and customs applicable in armed conflict, crimes against humanity, and finally, certain crimes established under or pursuant to treaty provisions listed in an annex which "constitute exceptionally serious crimes of international concern." While none of these categories has been entirely problem free, the greatest controversy surrounds the list of treaties contained in the annex. This consists of an enumeration of instruments addressing such central issues of international concern as war crimes (contrary to the Geneva Conventions of 1949 and Protocol I of 1977), hijacking, torture, and apartheid. Significantly, it embraces crimes involving illicit traffic in narcotic drugs and psychotropic substances under Article 3(1) of the U.N. Drug Trafficking Convention of 1988.

More Restrictive View

There is substantial support, however, for taking a much more restrictive view of the initial scope of subject matter jurisdiction. For example, the United States and the United Kingdom, among many other Western and developed nations, have voiced strong opposition to the inclusion of drug offenses. The position articulated by the U.N. Crime Prevention and Criminal Justice Branch and the U.N. International Drug Control Program that the court should be given jurisdiction over a broader range of offenses associated with modern organized transnational crime has not found a receptive audience.

Also significant is the widely held view that whatever the final scope of the court's subject matter jurisdiction might be, it is highly desirable that the crimes in question be much more precisely defined within the statute itself. The perceived need for greater certainty and clarity has generated questions about whether it would be possible, for example, to formulate an acceptable definition of the crime of aggression.

Overall, the discussions reveal the desire of many states for a more modest court in the terms of jurisdictional reach. There is strong support to limit the offenses to the "core crimes" of genocide, crimes against humanity, and serious violations of the laws and customs of war.

This high level of concern over the scope of the subject matter jurisdiction as proposed by the ILC continues in spite of the fact that the ability of the court to play a role in the prosecution of offenses covered by Article 20 is severely circumscribed by subsequent provisions, which, in large measure, give emphasis to the concepts of consent and state control. The two major exceptions to such provisions relate to the crime of genocide and cases referred to the court by the U.N. Security Council. The commission took the view that the court should possess an inherent jurisdiction over the former type of case.

Conclusion

As the judges of the Yugoslav Tribunal have noted, "a permanent international criminal court has been eagerly awaited by human rights advocates and governments alike for more than half a century." Many would agree with them that it is "urgently required," and that "it is truly the 'missing link' of international law."

While considerable progress has been achieved within the U.N., it is evident that much remains to be done if this goal is to be achieved. Whether the necessary political will and spirit of compromise exist to take this ambitious step should become apparent before the end of the year. ❑

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responsibilities for administrative cases and the administrative law.

A Supreme Judicial Council, established by the new constitution, is comprised of 25 members, of which 11 are judges. The Judicial Council determines the organization and composition of the judiciary, including the appointment, promotion, and removal of judges.

A very important element of Bulgaria's new government is its guarantee of the independence of the judiciary, which is found in article I-17 of the constitution. This section provides that in the performance of their functions all judges, prosecutors, and investigating magistrates will be subservient only to the law. Such a provision means that judges shall decide matters before them "impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats, or interferences, direct or indirect, from any quarter or for any reason."

The independence of the judiciary is connected to the courts' exclusive authority to decide whether an issue submitted to them is within their competence as defined by law. The courts have jurisdiction over all issues of a juridical nature.

In conformity with the new constitution, only the expressly appointed courts may try judicial cases. Specialized courts may be established only by virtue of law. There will be no extraordinary courts. The unified judicial system in Bulgaria hears all civil, penal, and administrative cases. Disputes that until recently were decided by so-called state arbitration and other specialized jurisdictions are now within the competence of the courts.

Another basic principle established by the new constitution is that everyone shall have the right to trial by ordinary courts using established legal procedures. The courts shall ensure the establishment and the mutual right to challenge evidence of the parties in a trial, and judicial proceedings shall be conducted to ensure the establishment of the truth about the matter before the court. ❑

International Law—A Binding Body of Rules for Nations to Follow

by Bruno A. Ristau
District of Columbia Bar
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International law is a binding body of rules applied by and to states in their international interaction. The rules rest partly on generally approved practice, assent to which is either presumed or, in respect of a particular state declining adherence, immaterial. International law is objective law after it has by time and experience acquired general recognition and application by international tribunals. The term international law seems to have first been used by Jeremy Bentham, and it has almost entirely replaced the older term "law of nations."

Traditionally, international law has governed relations between states. The word "international" indicates that the rules govern nations. But beginning in the latter part of the nineteenth century, and especially since World War II, international organizations (like the United Nations or the World Bank), individuals, recognized revolutionaries, minorities, administrative unions, combatants, and prisoners of war have also become the subjects of rights and duties declared by international law.

Unique examples of international law in action are furnished by the Nuremberg war crimes trials and the establishment by the United Nations three years ago of an international criminal tribunal for the prosecution of war criminals in the former Yugoslavia.

International law is a developing field. There have been several movements in recent decades to permit individuals to sue a foreign state under certain circumstances in an international forum, a privilege that would of course depend on a treaty. A number of interesting questions are raised by these developments: Would the relation between the individual and a foreign state still be governed by international law? Has the concept expanded so as to take in new topics? Was it too narrow in the first place? Are the "new subjects" merely the indirect objects of international law or are they new branches of public law affecting the relations of states with individuals? The answers depend on a major premise, and since that premise is definitional only, it is relatively unimportant to an understanding of the nature of international law.

The Sources of International Law

The major sources by which rules of international law are formulated are (1) conventions, treaties, or agreements (hereafter "accords") between foreign states or foreign states and international organizations ("conventional international law"); and (2) international usage, giving rise to custom ("customary international law").

Until 1947, all international accords that the United States entered into were published annually in the Statutes at Large. The dramatic increase in their number during and after World War II (the 1945 Statutes at Large alone contain five volumes of international accords) prompted the U.S. Congress to pass a law in 1947 requiring the Department of State to publish all international accords in a separate official publication, *United States Treaties* ("U.S.T."). In addition, all treaties and conventions that are ratified by the President, and all agreements with foreign government agencies that are entered into by executive officials with presidential or congressional authorization, are given "T.I.A.S." numbers (short for "Treaties and Other International Agreements Series").

The principal treaties that establish international law are the great lawmaking treaties, which, insofar as they are not merely a declaration of preexisting customary law, are law only for those states that have ratified them. Among such important treaties are the Charter of the United Nations; peace treaties; conventions to combat international terrorism, skyjacking, and drug trafficking; treaties embodying territorial purchases or settlements; conventions establishing administrative unions (e.g., the Universal Postal Union); and conventions codifying the privileges and immunities of diplomats and consular officers. Distinctions should be made between treaties governing only two contracting states (bilateral treaties) and general treaties binding a large number of states (multilateral treaties or conventions) and, on matters of custom, other states by implication.

Under U.S. law, some of these treaties and conventions bind only the United States government vis-a-vis its treaty partner(s). Other accords, known as "self-executing treaties," can be the source of private rights and are directly enforceable in court like any other federal law.

The sources of international law are thus more flexible and diverse than those of any domestic legal system. The method of its growth resembles that of the common law rather than the civil law, for it invokes as authority practice and precedent. The opinions of the International Court of Justice (and its predecessor, the Permanent Court of International Justice) and of international arbitral tribunals (such as the Iran-United States Claims Tribunal in The Hague) are regarded as primary authority; but any practice or opinion deemed to have weight may also be legitimately used as persuasive evidence. The rules of evidence are not rigid. International law is therefore quite unhampered in its growth by restrictions of method or jurisdictional technique.

Custom As International Law

Conventional international law—treaties and (most) executive agreements—are the "supreme Law of the Land" under the Supremacy Clause of the Constitution (Art. VI, cl. 2). The difficulty with custom is one of proof. It is always a troublesome matter to decide at what stage custom can be said to have become authoritative.

The evidences of custom are either documents tending to show what the practices of states are or have been, writings of publicists to show general opinion, or the decisions of international tribunals and national courts. The documents evidencing practice are treaties between particular states, domestic statutes and decrees, instructions issued by governments prescribing rules for diplomatic and consular officers, opinions of attorneys general and law officers on international subjects, diplomatic correspondence, the decisions of prize courts and other domestic courts, and the history and record of international transactions, including proceedings of international conferences. The writings of jurists have weight according to the authority of their authors; among the best and most readily available evidences is the authoritative *Restatement (Third) of the Foreign Relations Law of the United States* (2 vols., 1987).

Duty to Apply International Law

The most frequently cited passage regarding the duty of the courts to determine and apply international law is found in a 1900 Supreme Court case known as *The Paquete Habana* (175 U.S. 677). The suit arose during the Spanish-American War of 1898 and concerned the capture by U.S. Naval ships of two small Spanish fishing vessels off the coast of Cuba. The vessels were brought into a prize court in Key West, condemned as enemy property, and sold under decree of court. The issue on appeals was whether, in the absence of an Act of Congress or treaty, fishing vessels were protected from capture by international law, and whether international law is part of the domestic law of the United States. Speaking for a unanimous Court Justice Gray held:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act of judicial decision, resort must be had to the customs and usages of civilized nations; and as evidence of these, to the works of jurists and commentators, who by years of labor, research, and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

Since World War II, Congress has on several occasions legislated broadly on a number of topics that were previously governed by rules of customary international law, or it has enacted implementing legislation adopting as a matter of federal law treaty provisions that were not self-executing. Thus, in 1945, immediately following the establishment of the United Nations, Congress passed the International Organization Immunities Act (22 U.S.C. §§ 288–288h).

In 1978 Congress enacted the Diplomatic Relations Act, adopting the 1961 Vienna Convention on Diplomatic Immunity as the sole body of rules on the subject and providing as a matter of federal law for direct actions against insurers of diplomats who are personally not subject to immunity from suit (22 U.S.C. § 254a–254e, 28 U.S.C. § 1364). An example of congressional legislation implementing a multilateral treaty undertaking is found in the 1984 amendment to the Federal Criminal Code, 18 U.S.C. § 1203, adopting the International Convention Against the Taking of Hostages. ❑

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In instances where only a summary of the judgment is provided, the text of the full opinion is available from the Registry of the Court.

The court also publishes a digest of case law of the European Community (European Union). The E.C. maintains offices in 38 countries from which the reports may be ordered. The U.S. site for official E.C. publications is UNIPUB, 4811-F Assembly Drive, Lanham, MD 20706-4391, phone (800) 274-4888, fax (301) 459-0056.

Yearbook of the International Law Commission—In 1947 the United Nations created the International Law Commission, a group of 34 jurists from U.N. member countries who meet to "make recommendations for the purpose of . . . encouraging the progressive development of international law and its codification." The proceedings of the commission are published regularly in the *Yearbook of the International Law Commission*, which can be obtained from Sales Section, United Nations, New York, NY 10017, or from Distribution and Sales Section, Office of the United Nations, 1211 Geneva 10, Switzerland.

American International Law Cases (AILC)—AILC is a compilation of cases from the federal and state courts of the United States relating to international law. These case reports are printed in three series. The first series in 31 volumes contains cases from 1783–1979; the second includes those from 1979–1989 in 27 volumes; and the third covers reports from 1990–1993 in 41 volumes. The second series ends with a set of seven volumes dealing with "sources and documents" relating to international law other than judicial decisions.

Further information about these reports can be obtained from the publisher, Oceana Publications, 75 Main Street, Dobbs Ferry, NY 10522.

Encyclopedia of Public International Law—In 1981 the Max Planck Institute for Comparative Public Law and International Law of Stuttgart, Germany, began publication of a 12-volume series of the *Encyclopedia of Public International Law*. The first encyclopedia was completed in 1990. Work began in 1992 on a second encyclopedia of the same name. Two volumes of the new, condensed multivolume set have been published. Further information about the encyclopedia can be obtained from Elsevier Science Publishers B.V., Sara Burgerhartstraat 25, P.O. Box 211, 1000AE Amsterdam, The Netherlands.

Two other publications are worthy of mention for researchers of issues of international law. In 1986 the *George Washington Journal of International Law and Economics*, in Washington, D.C., published a special issue, "Guide to International Legal Research." This bibliography of materials is divided into three parts: primary sources, including codified law and case law; secondary sources, composed of serials and analytical tools; and research tools, including practice and research aids and reference sources.

The first part identifies such primary sources as codified law in the form of constitutions, treaties, statutes and legislative materials; administrative and regulatory materials; case law reports containing the decisions of international tribunals; relevant national court decisions; and arbitral awards.

The secondary source sections include references to mass media, bulletins and newsletters, periodicals, periodical indexes, loose-leaf services, digests, textbooks, casebooks, legal encyclopedias, and dictionaries. The third section, relating to research tools, provides information about practice manuals, practice handbooks and guides, bibliographies, organization lists, document systems, and computer databases.

Copies of this issue of the journal (vol. 20, nos. 1 & 2) can be obtained from the George Washington Journal of International Law and Economics, The National Law Center, George Washington University, Washington, DC 20052, phone (202) 994-7164.

A shorter, similar publication is *Practice and Methods of International Law* by Shabtai Rosenne, published in 1984 by Oceana Publications, 75 Main Street, Dobbs Ferry, NY 10522. ❑